No. 9031

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT DeSHAY LEE,

Appellant,

—vs.—

UNITED STATES OF AMERICA,

Appellee,

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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INDEX

SUBJECT INDEX

TABLE OF CASES CITED

TABLE OF STATUTES CITED

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant was indicted and tried in the above cause in the United States District Court for the Western District of Washington, Northern Division, together

with four other defendants, Vernon Paul Green, Jean Green, Sherman Johnson and James Barker. The defendants Vernon Paul Green and Jean Green were convicted on both counts of the indictment. Marie Harris entered a plea of guilty. Appellant was convicted on Count I and acquitted on Count II.

The conspiracy count of the indictment against the appellant and his co-defendants, count I (under Sec. 88, Title 18, U.S.C.A.), charges that the period of the conspiracy to violate the provisions of the White Slave Traffic Act (Sec. 398, Title 18, U.S.C.A.), was between July 4th, 1936, and July 16th, 1937. (Tr. 3, 4). Overt acts are set forth in this count covering certain acts of the defendants during this period. (Tr. 5-8)

According to the testimony at the trial the victim in the case, June Allen, first met the defendant Vernon Paul Green in Seattle, on July 4th, 1936. She next saw him with the defendant Sherman Johnson, alias Ben Purvis, in Portland, Oregon, on July 8th, 1936, at the place where she was working as a prostitute. Green asked her to come to Seattle to practice prostitution. At that time she declined, but later met him at Marie Harris' place in Portland, and agreed to come to Seattle. (Tr. 25, 31) Marie Harris told June Allen in Green's presence that if he could stop her from drinking and running around so much she would be much better off in Seattle than in Portland. After

June Allen packed her clothes she proceeded to Seattle with the defendants Green and Johnson, alias Ben Purvis, in Green's automobile. On the way to Seattle, Green told her that if she did as he said she could make more money in Seattle than she did in Portland.

Upon their arrival in Seattle, they went to the house of prostitution at 919 Washington Street, where she met Mrs. Green. Mrs. Green explained to June Allen how the house was run, and that they were to equally divide the proceeds, except that Mrs. Green was to receive fifty cents per day in addition. (Tr. 28, 29) June Allen practiced prostitution at this place from July 9th, 1936, until July 16th, 1937. (Tr. 31)

She met appellant Robert DeShay Lee on August 4th, 1936, at Mrs. Green's place, where she was working. He drove past the house and waved at Mrs. Green. Mrs. Green told June Allen not to wave back, stating "That is Sonny Lee, and if you do, he will be back in half an hour." Lee did come back and Mrs. Green introduced them. (Tr. 32) Lee asked June to go out with him, which she did. On this occasion he asked her to move in with him but she told him she could not because she was going with Barker. However, on August 15th, 1936, June Allen moved in with Lee. She gave him all of the money she had made for approximately nine months off and on; during this

period she lived with him about seven months of the time. (Tr. 33)

June Allen made one trip to Portland with Lee the latter part of September, 1936. She had mentioned for several days that she wanted to go to Portland to see her mother and son, who were both ill. Lee said "No, when I get ready, I will take you." (Tr. 33) Prior to their leaving she packed a small bag with several dresses in it, but when she arrived in Portland they were missing. (Tr. 33, 34) Later, she found them thrown behind the furniture in her room at the Greens'. Mrs. Green told her that Lee had placed the clothes there so she couldn't take them with her. (Tr. 34) On the trip to Portland she and Lee stopped at Vancouver, Washington, where she got out of the car and took the bus to Portland. She later met Lee at the home of Myrtle Barno. (Tr. 34) June Allen stayed in Portland one night and two days. She stayed with Lee that night and had intercourse with him. (Tr. 34) She visited her mother in Portland, but Lee did not accompany her. (Tr. 35) After this trip she came back to Seattle and practised prostitution at the same place, continuing to give Lee her earnings as a prostitute. (Tr. 47, 33)

In November, 1936, she had a conversation with Lee about her earnings. Being ill, she had called the doctor and had paid him. The next day she tucked

some of the money in the bed. June Allen gave Lee some money; he asked her where the rest was—told her she was lying and demanded that she tell where the rest was. She was not able to hold out the balance of the money. (Tr. 33) She gave Lee a combination cigar lighter and clock for Christmas in 1936, which she purchased at Bridges' jewelry store; (Tr. 34, 60) the same was found in Mr. Lee's room by Mr. D. S. Hostetter of the Federal Bureau of Investigation, on September 7th, 1938. (Tr. 69) Later she made a trip to Portland with Mrs. Green on Decoration Day, 1937, and returned to Seattle to practice prostitution. (Tr. 34, 35) This she did at the Green place at 919 Washington Street, in Seattle, until July 16th, 1937. (Tr. 31)

QUESTIONS

Appellant claims (a) that the evidence against the appellant was not sufficient upon which to base a conviction, and (b) that the Court erroneously instructed the jury.

ARGUMENT

THE EVIDENCE WAS SUFFICIENT UPON WHICH TO BASE A CONVICTION FOR CONSPIRACY TO VIOLATE THE WHITE SLAVE TRAFFIC ACT.

The crime of conspiracy is a continuous offense and

is a different violation from the substantive offense. The period involved was from July 4th, 1936, to July 16th, 1937. (Tr. 3, 4) The prosecution does not have to prove that there was a specific agreement entered into by the parties to do the act charged; it is sufficient if it is shown that there was a concert of action with all the parties working together understandingly, with a single design for the accomplishment of the purpose. *Marino v. United States,* (C.C.A. 9) 91 F. (2d) 691; cert. denied 302 U.S. 764; *Stack v. United States,* (C.C.A. 9) 27 F. (2d) 16; *Pearlman v. United States,* (C.C.A. 9) 20 F. (2d) 113, cert. denied 275 U.S. 549. It is claimed that the appellant did not meet June Allen until August 4th, 1936, therefore he could not be held for any acts committed before that date, but Lee having entered the conspiracy at a later date and co-operating in the common effort assumed responsibility for all that had gone before even though he might not have originally conceived the plan. *Lefco v. United States,* (C.C.A. 3) 74 F. (2d) 66. Furthermore, when once a conspiracy is shown to exist, it continues to exist until there is some affirmative act of termination. *Hyde v. United States,* 225 U.S. 347; *United States v. Rollnick,* (C.C.A. 2) 91 F. (2d) 911, 918; *Coates v. United States,* (C.C.A. 9) 59 F. (2d) 173; *Marino v. United States, supra.*

The object of the conspiracy was to bring June

Allen to Seattle and to keep her in Seattle to work as a prostitute in order to supply a source of income to the defendants. The act of Lee, June Allen's "man" whom she supported with the proceeds of her trade, in hiding her clothes (Tr. 34), can only be reconciled with the fact that he wanted to make certain that she would return to 919 Washington Street, continue to work for Green and his wife, and support appellant. The transportation of June Allen to Portland by Lee is set forth as an overt act. not as a substantive offense (Tr. 7). An overt act in and of itself need not constitute a substantive offense. *Coates v. United States, supra.* But for the purpose of argument, defendant claims that June Allen had no immoral intent when she and Lee went to Portland. Her intent is immaterial. The intent of the defendant need only be considered. The fact is that he did not visit June Allen's mother in Portland, but he did stay with June Allen and had intercourse with her the night of their arrival in Portland. (Tr. 34. 35) *Aplin v. United States,* (C.C.A. 9) 41 F. (2d) 495, 496. We might further ask why she got out of Lee's car at Vancouver, Washington, near the Oregon line, and took a bus to Portland, Oregon. later meeting Lee there, if Lee did not have a guilty intent thinking he could thereby evade the provisions of the Mann Act (Sec. 398. Title 18, U.S.C.A.). (Tr. 34) After this trip June Allen

came back to Seattle, resumed the practice of prostitution at the same place and continued to give her earnings to the appellant. Now, what of the appellant's purpose; it is certainly clear from the evidence that he wanted to hold on to this woman as his source of income and continue his illicit relations with her. She lived with Lee before they went to Portland and gave him her earnings and supported him after she returned.

In *McDonald v. United States*, (C.C.A. 8) 89 F. (2d) 128, cert. denied 301 U.S. 697, rehearing denied 302 U.S. 773, an indictment was returned under Sec. 408c, Title 18, U.S.C.A., charging a conspiracy to violate the statute against transportating in interstate commerce a person who had been kidnaped (Sec. 408a, Title 18, U.S.C.A.). The appellant participated neither in the kidnaping nor in the transportation. He played no part in the conspiracy until seven months after the victim was released when he exchanged marked ransom money for unmarked money. The Court said in upholding the defendant's conviction:

> "The cases of Laska v. United States, supra, and Skelly v. United States, supra, are wholly similar to the case at bar. There, as here, the indictment was under section 408c, title 18, U.C.C. (18 U.S.C.A. Sec. 408c), as it read prior to the amendment of January 24, 1936 (18 U.S.C.A. Sec. 408c-1); there, as here, the accused therein was not a party to the original conspiracy, but only

> came into it after payment of the ransom and the release of the victim and took part in exchanging marked ransom money for unmarked money; and there, as here, the indictment was drawn so as to charge such fact aptly and to charge a continuing criminal conspiracy surviving till after the making of the exchange. Nothing is clearer than that the latter two cases are squarely in favor of the view that the conspiracy in the instant case had not ended, when in September, 1934, appellant committed the overt acts charged against him. For in each of those cases the precise contentions urged in the case at bar were urged by the appellants therein; but the court disallowed these contentions and held that a conspiracy under section 408c, supra, to violate the provisions of section 408a, supra, did not end till the marked money paid as ransom had been exchanged for unmarked money."

Laska v. United States, (C.C.A. 10) 82 F. (2d) 672, cert. denied 298 U.S. 689;

Skelly v. United States, (C.C.A. 10) 76 F. (2d) 483, cert. denied 295 U.S. 757.

June Allen was originally brought to Seattle for the purpose of commercial prostitution. She lived with Lee and gave him her earnings before their trip to Portland; she lived with him and had intercourse with him on their trip to Portland; she lived with him after she returned to Seattle and continued to give him the proceeds of her earnings at the Greens' house of prostitution at 919 Washington Street.

It appears from the foregoing that appellant's contention that the evidence was insufficient is without merit.

THE INSTRUCTIONS OF THE COURT WERE NOT ERRONEOUS.

June Allen, on cross-examination, testified that she had been a witness in the case of United States vs. Proctor, another White Slave case in this district, admitting that in the Proctor trial she had not testified in Federal Court against anyone else, and that in fact, she had testified before the Grand Jury. In answer to the defense attorney's question that the statement in the Proctor case was false, the witness stated as follows: "Yes, and I might also say that I don't know the difference between those things." (Tr. 47, 48, 49) She again stated that she had testified before the Grand Jury. (Tr. 49) She admitted that she had testified falsely before the Commissioner in the Clark case. (Tr. 42. 43)

The matter to which the witness testified on cross-examination was on a collateral matter and not in connection with any testimony concerning the cause on trial. The general rule as cited in 16 *Corpus Juris, at page* 1012, is as follows:

> "It is not error to instruct on the law as to the impeachment of witnesses in the absence of a proper request therefor or where there is not sufficient evidence of an impeaching character or where the impeaching testimony can be used only for that purpose and it has been held that a special instruction on such a subject is unnecessary

> even where witnesses are impeached, particularly where the subject is sufficiently covered by other instructions."

From the testimony it is not clear that the witness knowingly told an untruth in the Proctor case because she was asked whether or not she had testified in Federal Court before against anyone else; doubtless, if she had been specifically asked if she had testified before the Grand Jury she would have answered in the affirmative.

Appellant complains that the court refused to give a requested instruction based on *Sec.* 1212, *Remington's Compiled Statutes of Washington.* The fact is, assuming that this statute would apply, the court amply covered it with the following instruction inasmuch as the witness had not theretofore been convicted of the crime of perjury.

> "You are instructed that no person offered as a witness should be excluded from giving evidence by reason of conviction of a crime, but such conviction may be shown to effect his credibility." (Tr. 123)

That the case cited by the defendant, *Speiller v. United States,* (C.C.A. 3), 31 F. (2d) 682, is not applicable in the instant cause, is self-evident from a reading thereof. It will be noted that the Court specifically refers to the particular facts in the Speiller case in arriving at its decision, and that the facts are

entirely different from the facts in the instant case. In addition, appellant did not make a specific request for an instruction such as he now claims should have been given. He cannot now be heard to complain.

Lonergan v. United States, (C.C.A. 9) 88 F. (2d), 591, 595, reversed on other grounds, 303 U.S. 33, reaffirmed 95 F. (2d) 642, cert. denied 304 U.S. 581;

Girson v. United States, (C.C.A. 9) 88 F. (2d), 358, cert. denied 301 U.S. 697.

Further, the court's instructions amply covered the subject.

"You are instructed that a witness who is a prostitute is competent to testify; that the showing that such witness is a prostitute is for the purpose of affecting the credibility to be given such witness, and the weight to be given her testimony." (Tr. 123)

"You are instructed that no person offered as a witness should be excluded from giving evidence by reason of conviction of a crime, but such conviction may be shown to effect his credibility." (Tr. 123)

"You are the sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness you have a right to consider his demeanor upon the witness stand, his apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness related, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstances arising from the evidence which

appeals to your judgment as in any way affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to." (Tr. 127)

"You will be slow to believe that any witness has testified falsely in the case, but if you do, then you are at liberty to disregard the testimony of such witness entirely except insofar as same may be corroborated by other credible evidence in the case." (Tr. 127)

CONCLUSION

It is respectively urged that the lower Court committed no error in the instructions submitted to the jury, and that the evidence at the trial of the cause was sufficient upon which to base a conviction. The judgment should be affirmed.

Respectfully submitted,

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